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NO. 88-1476

In the Supreme Court of the United States

OCTOBER TERM, 1988

C. T. CARDEN, LEONARD L. LIMES, and MAGEE DRILLING COMPANY,
Petitioners

v.

ARKOMA ASSOCIATES, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

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14 pp

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Argument 1

Conclusion 10

Certificate of Service 11

TABLE OF AUTHORITIES

CASES: Page

Carlsberg Resources Corporation v. Cambria Savings & Loan Association, 554 F. 2d 1254 (3rd Cir. 1977) 7

Chapman v. Barney, 129 U.S. 677, 32 L. Ed 88 (S. Ct. 1889) 5

Elston Investment Ltd. v. David Altman Leasing Corporation, 731 F. 2d 436 (7th Cir. 1984) 5,9

Great Southern Fire Proof Hotel Co. v. Jones, 177 U. S. 449 2,5

Navarro Savings Association v. Lee, et al., 466 U.S. 458 (S. Ct. 1980) 1,2,3,4

New York State Teachers Retirement System v. Kalkus, 764 F. 2d 1015 (4th Cir. 1985) 7

Stouffer Corporation v. Breckenridge, 859 F. 2d 75 (8th Cir. 1988) 8

Trent Realty Associates v. First Federal Savings & Loan Association of Philadelphia, 657 F. 2d 29 (3rd Cir. 1981) 6

United Steel Workers of America v. Bouligny, Inc., 382 U. S. 145 (S. Ct. 1965) 5

STATUES:

Federal Rule of Civil Procedure 17(a) 4

IN THE
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PETITIONERS' REPLY BRIEF

TO THE HONORABLE, THE CHIEF JUSTICE
AND THE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES

This brief is submitted by petitioners, C. T. Carden, Leonard L. Limes, and Magee Drilling Company (hereafter "Carden", "Limes", "Magee", or collectively "Petitioners"), in reply to the opposition brief of Arkoma Associates (hereafter "Respondents").

Petitioners seek review of the decision of the Fifth Circuit Court of Appeals in this action on two grounds: (1) because that Court held diversity jurisdiction exists herein although Respondents are a purported limited partnership one of whose purported limited partners is a citizen of Louisiana as are petitioners, Carden and Limes, which holding conflicts with the decision of this Court in *Navarro Savings Association v. Lee*, 466 U. S. 458, 100 S. Ct. 1779, 64 L. Ed. 2d 421 (S. Ct. 1980), and (2) there is a conflict among

the decisions of the Second and Fifth Circuits on the one hand, and those of the Third, Fourth, and Seventh Circuits on the other, relative to the presence or absence of diversity jurisdiction in cases wherein a limited partnership, some of whose limited partners possess the same citizenship as adverse parties, is a litigant.

Conflict with Navarro:

Respondents argue that there is no conflict between the decision of the Fifth Circuit in this case and that of this Court in *Navarro*, supra, despite the fact that in its decision this Court cites a limited partnership as an example of an unincorporated association the citizenship of all of whose members must be considered in determining diversity jurisdiction. (Cf. *Great Southern Fire Proof Hotel Co. v. Jones,* 177 U.S. 449, 20 S. Ct. 690, 44 L. Ed. 842 (S. Ct. 1900), cited at 100 S. Ct. 1782.)

Respondents attempt to support their sophistic position arguing that this Court sustained diversity jurisdiction in *Navarro* because it determined the real parties at interest and tested diversity jurisdiction based on those parties' citizenship alone. Respondents neglect to mention the Court's essential point of departure, i.e. it first determined that the entity at issue in *Navarro* was not a partnership, but a business trust. After determining that it was dealing with a trust, the Court next established the authority of the trustees from the declaration of trust which was held to be:

> . . . . exclusive authority over this property "free from any power and control of the Shareholders, to the same extent as if the Trustees were the sole owners of the Trust Estate in their own right. . . " The respondents have power to transact Fidelity's business, execute documents, and "sue and be sued in the name of the Trust or in their names as Trustees of the Trust." They may invest the funds of the trust, lend money, and initiate or compromise lawsuits relating to the trust's affairs.

The Court turned to an analysis of the authority of the trustees only after determining that Fidelity was not a partnership, holding that, because they were trustees, they were the real parties at interest whose citizenship determined the presence or absence of diversity jurisdiction. This appears from the Court's remarks from 100 S. Ct. 1779 at page 1782, to wit:

> But this case involves neither an association nor a corporation. Fidelity is an express trust, and the question is whether its trustees are real parties to the controversy for purposes of a federal court's diversity jurisdiction.
>
> As early as 1808, this Court stated that trustees of an express trust are entitled to bring diversity actions in their own names and upon the basis of their own citizenship. . . . Federal Rule of Civil Procedure 17(a) now provides that such trustees are real parties at interest for procedural purposes.

No one giving the remarks of this Court a fair and realistic interpretation can fail to realize that, had the entity involved in *Navarro* been a limited partnership, this Court would have held there was no diversity jurisdiction.

In footnote number 9, this Court clearly explains its meaning when it refers to the trustees as real parties in interest, and the extent to which their being real parties in interest, and the extent to which their being real parties in interest affects diversity jurisdiction, to wit:

> There is a "rough symmetry" between the "real party in interest" standard of Rule 17(a) and the rule that diversity jurisdiction depends upon the citizenship of real parties to the controversity. But the two rules serve different purposes and need not produce indentical outcomes in all cases. . . . In appropriate circumstances, for example, a labor union may file suit in its own name as a real party in interest under Rule 17(a). To establish diversity, however, the union must rely on the citizenship of each of its members. *Steelworkers v. Bouligny, Inc.* . . .

Thus, a litigant being a real party in interest is not sufficient in itself to confer diversity jurisdiction. In addition to being a real party in interest, a litigant must also possess citizenship that is diverse from that of all opposing parties. This Court found that diversity jurisdiction obtained in *Navarro* because *Federal Rule of Civil Procedure 17(a)* in pertinent part provides:

> Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust . . . may sue in his own name without joining with him the party for whose benefit the action is brought. . . .

In *Navarro* the Court clearly holds that if an organization is an express trust, the citizenship of the trustees alone need be considered in determining diversity jurisdiction because *Federal Rule of Civil Procedure 17(a)* so provides. It is this distinction, explained by this Court in footnote 9, supra, which the Fifth Circuit fails to take into account when it attempts to apply the *Navarro* decision to a limited partnership.

The inevitable consequence of Respondents' argument is the conclusion that the limited partners are not real parties at interest although, in the partnership at issue, they own 99% of the partnership while the general partners own 1%.

In that a limited partnership is an unincorporated association, both the general and limited partners are real parties at interest in the sense that members of each group own an interest in the entity. Therefore, the citizenship of members of neither group may be ignored when determining the presence or absence of diversity jurisdiction as this Court has repeatedly held. See *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 20 S. Ct. 690, 44 L. Ed. 842 (S. Ct. 1900); *United Steelworkers of America v. Bouligny, Inc.*, 382 U. S. 145, 86 S. Ct. 272, 15 L. Ed. 2d 217 (S. Ct. 1965); and *Chapman v. Barney*, 129 U. S. 677, 32 L. Ed. 800 (S. Ct. 1889).

Conflicts Among the Circuits:

The second point of Respondents' argument, in which they state that there is no conflict among the decisions of the Fifth Circuit and those of the Third, Fourth, and Seventh Circuits regarding diversity jurisdiction in cases wherein a limited partnership is a party, is grossly wrong. The error of such statement is obvious to anyone who takes the time to read the decisions. For example, in *Elston Investment, Ltd. v. David Altman Leasing Corporation*, 731 F. 2d 436 (7th Cir. 1984) the Seventh Circuit states that:

> ThermaSol bases its argument for an exception to the rule on an analogy between a limited partnership and an express business trust. ThermaSol points out that general partners, like a trustee, manage the assets of a limited partnership, and

> control litigation involving the partnership. . . Because the Court held in *Navarro Saving Ass'n v. Lee* . . . , that only the trustee of an express business trust was a "real party" to controversies involving the trust, ThermaSol concludes that only the general partners are "real parties" to controversies involving a limited partnership.
>
> In *Navarro*, The Supreme Court explicitly rejected the very analogy upon which ThermaSol now relies.

In *Carlsberg Resources Corporation v. Cambria Savings and Loan Association*, 554 F. 2d 1254 (3rd Cir. 1977) the Third Circuit held:

> This case poses an intriguing problem concerning the diversity jurisdiction of the federal courts. Specifically we must ascertain whether an identity of citizenship between a number of limited partners of a plaintiff partnership and the defendants precludes an exercise of diversity jurisdiction. . . .
>
> When the rule of complete diversity is read in conjunction with the principle that the citizenship of a partnership depends upon that of its members, it becomes clear that diversity jurisdiction may not obtain here, unless *all* of the members of the plaintiff partnership are of distinct citizenship from all of the defendants. Since such diversity in citizenship is lacking, the district court properly dismissed the complaint for want of jurisdiction.

In *Trent Realty Associates v. First Federal Savings and Loan Association of Philadelphia*, 657 F. 2d 29 (3rd Cir. 1981) the Third Circuit stated that:

> Analysis of the diversity issue must begin with the undisputed proposition that a limited partnership is an unincorporated association whose citizenship is deemed to be that of the "persons composing such association." . . . Applying that holding to the precise issue raised here, this court held that the citizenship of a limited partner will defeat diversity if it is the same as one of the parties on the opposing side. *Carlsberg Resources Corp. v. Cambria Savings & Loan Ass'n* . . .
>
> First Federal urges us to abandon the holding of *Carlsberg Resources* on the ground that the subsequent decision of the Supreme Court in Navarro Savings Ass'n v. Lee . . . requires that we apply a "real party in interest" test in determining Trent's citizenship. It argues that under the analysis in *Navarro*, only the general partners are such parties here. We do not read *Navarro* to require us to depart from the precedent of *Carlsberg Resources*.

In *New York State Teachers Retirement System v. Kalkus*, 764 F. 2d 1015 (4th Cir. 1985) the Fourth Circuit held:

> Thereafter, the Supreme Court held in *Navarro Savings Ass'n v. Lee*, . . . that only the citizenship of the trustees of a Massachusetts business trust had to be taken into account for purposes of diversity jurisdiction. Although the Court recognized the *Chapman-Great Southern* rule for unincorporated associations, it explained that the express trust was "neither an association nor a corporation for purposes of the diversity analysis."
> . . . The Court also explained in a foot note that:
> "The Court has never analogized express trusts to business associations for purposes of diversity jurisdiction. . . . Clearly, *Navarro* does not

> authorize the extension of the use of the "real party-in-interest" test in cases of trusts to business associations, such as limited partnerships.

In glaring contrast to the foregoing jurisprudence, in the instant case the Fifth Circuit held:

> On the other hand, if Arkoma is a limited partnership, the citizenship of the partnership is determined by the citizenship of the general partners only; the citizenship of limited partners is irrelevant. In the latter instance, the requirements of diversity jurisdiction are met. See *Navarro Savings Association v. Lee*, 446 U. S. 458 (1980).

In addition to the jurisprudence of the Third, Fourth, and Seventh Circuits refusing to ignore the citizenship of limited partners when determining the existence of diversity jurisdiction, the more recent decision of the Eighth Circuit may be added. In *Stouffer Corporation v. Breckenridge*, 859 F. 2d 75 (8th Cir. 1988), the plaintiff, Stouffer, an Ohio corporation, was the general partner of a limited partnership. Some of the limited partners were Missouri citizens as was the defendant. The district court confronting the conflict in the decisions of the Second and Fifth Circuits on the one hand, and those of the Third, Fourth, and Seventh Circuits on the other, denied defendant's motion to dismiss for lack of diversity jurisdiction, but certified the question for interlocutory appeal. The Eighth Circuit granted the appeal, reviewed the jurisprudence, reversed the denial of the motion to dismiss, and ordered the case dismissed for lack of diversity jurisdiction, holding:

> Having granted the request, we conclude the citizenship of limited partners must be considered

> in determining diversity jurisdiction. We therefore remand the case to the district court with directions to dismiss for lack of jurisdiction.
>
> It is well established that diversity jurisdiction attaches only when all parties on one side of the litigation are of a different citizenship from all of those on the other. . . A corporate litigant has long been conclusively presumed to be a resident of its state of incorporation. . . . An unincorporated association, however, has traditionally been viewed as a citizen of the state of each of its constituent members. . . . That traditional, narrow view of federal jurisdiction over unincorporated associations was challenged but reaffirmed in *United Steelworkers v. R. H. Bouligny, Inc.* . . . Appellate decisions in three circuits mandate consideration of the citizenship of limited partners. (Citing *New York Teachers, Elston, Trent,* and *Carlsberg.)* Two circuits have adopted a less restrictive approach, deciding on a case by case basis whether the limited partner is a real party to the controversy. . . .
>
> The reasons for the rule we adopt are well explained in the above-cited decisions from the Third, Fourth, and Seventh Circuits. A limited partnership is one form of unincorporated association, and the court has long required consideration of the citizenship of all members of such associations. Therefore this rule is "more consonant with Supreme Court precedent." . . .
>
> Finally, we reject the plaintiff's contention that the Court in *Navarro Sav. Ass'n v. Lee* . . . changed direction and now requires a detailed determination whether nondiverse citizens are real parties to the controversy in all cases involving

unincorporated associations. The Court explicitly stated that the case involved "an express trust" and "neither an association nor a corporation."

Respondent's contention that there is no conflict among the decisions is egregiously wrong.

CONCLUSION

The court should grant the requested writ of certiorari, resolve the conflict among the decisions of the Circuits, reverse the Fifth Circuit, and dismiss this case for lack of diversity jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing have been sent to each opposing counsel of record by depositing the same in the U. S. Mail, postage prepaid this 18th day of April, 1989.

I further certify that all parties required to be served have been served.

_____
Richard K. Ingolia